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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 395

EL PASO ELECTRIC COMPANY, Appellant

v.

ROBERT S. CALVERT, at al., Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No._____

EL PASO ELECTRIC COMPANY, Appellant

v.

ROBERT S. CALVERT, at al., Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin entered December 2, 1964, and submits this statement to show that The Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented:

A. OPINION BELOW

The judgment appealed from and the only opinion delivered in the courts below was delivered by the Court of Civil Appeals for the Third Supreme Judicial District of Austin, Texas in No. 11,270, a copy of which is attached hereto as Appendix A, and which is reported as: *El Paso Electric Co. v. Calvert, 385 S.W.2d 542 (Tex. Civ. App., Austin, 1964, writ ref. n. r. e.).*

B. GROUNDS ON WHICH THE UNITED STATES SUPREME COURT JURISDICTION IS INVOKED

(1) Nature of Proceedings

Appellant sued officers of the State of Texas to recover taxes paid under protest and deposited in a suspense fund as provided for all such contested tax payments by Texas statute. (Article 7057b, Vernon's Civil Statutes). The taxes were collected by the State under authority of Article 11.03, Chapter 11, Title 122A, "Taxation-General", Vernon's Civil Statutes(1960), the full text and designation of which is attached as Appendix B. That statute, Appellant contends, is unconstitutional under the Commerce Clause of the United States Constitution.

(2) Appeal Chronology

Appellant appeals from the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin in No. 11,270, (opinion attached as Appendix A) entered on December 2, 1964, affirming the judgment of the 126th Judicial District Court of Texas at Austin entered in No. 134,237 on June 11, 1964. On January 6, 1965, the Court of Civil Appeals denied Apellant's motion for rehearing. The Supreme Court of Texas in No. A-10,595 refused Apellant's application for writ of error "no reversible error" on March 24, 1965, thereby refusing to allow further appeal in State courts, and denied Appellant's motion for rehearing on that action on May 12, 1965. Notice of appeal to The United States Supreme Court was filed in the Court of Civil Appeals on June 4, 1965.

(3) Statutory Provision Conferring Jurisdiction.

This Court has jurisdiction of this appeal under 28 U. S.C. §1257(2).

(4) Cases Sustaining Jurisdiction

This Court has jurisdiction of an appeal from a Texas Court of Civil Appeals decision which upholds a state taxing statute in the face of objections to its validity under the Commerce Clause of the United States Constitution where the Supreme Court of Texas has finally refused to grant a writ of error. *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954).* See also, e. g., *General Motors Corp. v. Washington, 377 U. S. 436 (1964)* and *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).*

(5) Contested Statute

The Texas statute in question is Article 11.03, Chapter 11, Title 122A, "Taxation-General", Vernon's Civil Statutes (1960), the full text and designation of which is attached as Appendix B.

C. QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Whether the unapportioned Texas gross receipts tax levied by Article 11.03 (Vernon's Civil Statutes "Taxation General")[1] measured by charges made for electricity in Texas violates the Commerce Clause[2] of the United States Constitution when applied to power generated (and taxable) in New Mexico and subsequently transmitted directly to Texas consumers. More specifically, the appeal questions whether the tax is unconstitutional under the Commerce Clause because:

---

[1]Tit. 122A Ch.11 Taxation General; ACTS 1959, 56th Leg. 3rd C.S. p. 187, ch. 1.

[2]Article 1, §8, Clause 3, U.S. Constitution:
"The Congress shall have Power... To regulate Commerce... among the several States."

(1) The tax creates the *risk* of multiple taxation. Is the *risk* of multiple taxation of interstate commerce enough to invalidate the tax, or must an *actual* multiple burden be shown, as held in the Court below?

(2) The tax fails to apportion the tax so as to exempt receipts attributable to interstate commerce, or to exempt income from purely interstate commerce solely attributable to Taxpayer's activities outside Texas.

(3) The tax is levied directly upon the activity of engaging in interstate commerce; or, stated another way, it is levied on an activity which is not a "local incident" separable from interstate commerce.

(4) The tax discriminates against interstate commerce and taxes the privilege of engaging in it.

D. STATEMENT OF THE CASE:

(1) Facts

Appellant, a Texas corporation, provides electrical energy from two generating plants, one at Anapra, New Mexico, and one at Newman, Texas, to consumers in Texas and New Mexico. Appellant's major revenue is receipts from charges for power consumed in El Paso, Texas. It was stipulated and found as fact in the trial court that during the contested period prior to this litigation, the New Mexico generating plant provided from 39 to 49 per cent of the electrical energy consumed in the three cities affected by the tax, (El Paso, Anthony and Van Horn). The percentages were based on calculations, because once the electricity is placed on the transmission lines it is impossible to dertermine the origin of any part of it. (See transcript of the record at page 37, hereafter abbreviated "Tr.").

Appellant owns and operates all generating and transmitting facilities and merchandises the electrical energy in question. No distributor or other third party intervenes between generation of the electricity in New Mexico and its consumption in Texas.

From 1942 through 1957, Appellant paid over a million dollars in gross receipts taxes to Texas under the statute here contested. (Tr. 52). In the same period it paid $226,418.96 gross receipts taxes on generation of electricity to New Mexico, a substantial part of which was the same energy taxed by Texas. (Tr. 41 and 52). The New Mexico statute (now repealed) is unquestionably constitutional under *Utah Power and Light Company v. Pfost, 286 U.S. 165, (1932)*, and is not contested here. It is, however, attached as Appendix C for the Court's information since it relates to the multiple burdens question.

At the trial, the following stipulations about the characteristics of electricity generally, and that involved here, were found as facts by the trial court (Tr. 37 and 99):

Electrical energy generated at the New Mexico plant flows across the state line without interruption at the speed of light (186,000 miles per second) directly to the ultimate consumer in Texas. (Tr. 37) Its generation, transmission, delivery and consumption take place in the same microsecond and for all practical purposes are simultaneous. (Tr. 37) The energy is not produced in advance of need and stored, and cannot be handled or packaged as a solid, liquid, or gas. (Tr. 37) If an unusually great share of electrical energy is suddenly consumed by the introduction of a high power-consumption device onto the supplying line, an immediate and almost instantaneous drop in voltage occurs. (Tr. 37)

Electric energy has no identifiable physical substance. The energy taken by the consumer which decreases temporarily the overall voltage in the supplying line, cannot, in any way, be distinguished from the energy on any other part of the line. (Tr. 37) Whereas it is possible, in theory, to dye or otherwise identify specific gas or water which is available under pressure in the consumer's lines next to the appliance or outlet which releases it for use, the electric energy is not a tangible, physical substance and cannot be so identified. (Tr. 37) The energy consumed by an electric light in a home in El Paso or Van Horn can be said to be electric energy which traveled directly to that point from the generator at the speed of light, or for any practical consideration, instantaneously. The flipping of a light switch in El Paso reduces (however imperceptibly and briefly) the total voltage over the entire length of the line. The energy travels interstate on Appellant's transmission lines from the generator directly to the filament at the speed of light. (Tr. 37) Appellant owns and controls the entire transmission process. (Tr. 39)

(2) How The Federal Question Was Raised in Proceedings Below

The federal question - constitutionality of the taxing statute under the Commerce Clause - was first raised by Appellant's protest letters, accompanying protested payments as required by Texas statute. (See Tr. 7 et seq. and Tr. 35). The same question was again raised in Plaintiff's pleadings at trial. (See Plaintiff's Original Petition, page 3, Tr. 4; Plaintiff's First Amended Original Petition, pages 3 and 4, Tr. 65 and 66; and Plaintiff's Second Amended Original Petition, pages 3, 4 and 5, Tr. 75, 76 and 77). The trial court impliedly upheld the constitutionality of the statute by granting judgment for the State (Tr. 85), and expressly did so in its conclusions of law

where it found: "That the Plaintiff . . . has not proved that the tax imposed by virtue of Article 11.03 . . . constitutes an undue burden on interstate commerce." (Tr. 99).

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, the Federal Constitutional question was raised by Appellant's Point of Error No. 1: "The district court erred in concluding that the tax imposed by Article 11.03 . . . under these facts, did not violate the Federal Constitution." This position was renewed in Appellant's reply brief and its motions for rehearing.

In the Supreme Court of Texas, Appellant's application for writ of error stated as Point of Error No. 1: "The Court of Civil Appeals erred in holding that the tax imposed by Article 11.03, Title 122A VACS, under these facts, does not violate the Commerce Clause of the Federal Constitution", and the same position was taken in supplemental briefs and motion for rehearing.

E. THE FEDERAL CONSTITUTIONAL QUESTION IS SUBSTANTIAL

Relying on this Court's decision in *General Motors Corp. v. Washington, 337 U.S. 436 (1964),* the Texas Court of Civil Appeals has held that a current *actual* multiple tax burden must be shown in order to prove a state tax constitutionally invalid. If that is a correct reading of the *General Motors* decision, then this appeal probably should be dismissed. But if this Court still adheres to the long established rule that the test of state tax validity is the *risk* of multiple tax burdens on intersate commerce, then the Court of Civil Appeals erred on a substantial federal question since a grossly incorrect test was applied to this tax.

In addition, this court has held in *Utah Power and Light Company v. Pfost, 286 U.S. 165 (1932)* that a state may constitutionally tax the generation of electricity destined for transmission across state lines. It did not rule then, and has not ruled since on the important question whether the receiving state may also tax the same electrical energy at its point of consumption and measure the tax by the same gross receipts or gross kilowatt hours as the generation tax, without apportioning the tax to relate it to the taxpayer's activities within the taxing state.

This court is respectfully urged to give plenary consideration to this case, with briefs and oral argument, for the following reasons:

(1) The "Risk" Test Has Been Rejected in The Court Below

The holding in the *General Motors* case does not specify what is meant by a tax which "places a burden upon interstate commerce in a constitutional sense." Does this mean that in every case an *actual existing* multiple burden must be shown at the time the question is raised, or when it is heard? If so, the General Motors decision is a dramatic departure from the Court's previous holdings.

That the *risk alone* is enough to invalidate the tax has not been questioned since *J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311 (1938)*. See, in accord, *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 368 (by implication) (1954); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 44 n. 2 (1940); Freeman v. Hewit, 329 U.S. 249, 256 (1946); Joseph v. Carter and Weekes, 330 U.S. 422, 429 (1947); Gwin, White & Prince v. Henneford, 305 U.S. 434, 439 (1939); Hartman, State Taxation of Interstate Commerce*:

A Survey and an Appraisal, 46 Virginia Law Review 1051 at 1074, (1960).

If this Court has made such a departure from the previously established rule, which seems unlikely, then it has an opportunity to clarify the new test: What constitutes an actual multiple tax burden? Must the burden exist at the time the suit is filed? At the time it is first heard? At all stages of the proceeding? Or is any past actual multiple burden, such as the one shown here for the years 1942 through 1957, sufficient?

If there has been no change in the established rule that the risk alone invalidates the tax, then the lower court has clearly erred because of an incorrect reading of the *General Motors* case. If it did so err, the merits of this case favor a full hearing of it. Furthermore, the confusion of the lower court suggests that others may misinterpret the *General Motors* decision. Clarification of this point is desirable.

(2) The Question is Novel

The question is substantial also because no decision since the *Pfost* case, 286 U.S. 165 (1932), has determined whether the electricity there held taxable at generation may again be taxed by gross receipts at consumption. The question is particularly important where neither the state of generation nor the state of consumption has attempted to apportion the tax to business activity within the taxing state.

(3) The "Risk" Test is the Only Feasible Way to Apply "Multiple Burdens"

The established "risk" test is the only logical way to go about making case law in this area and should be preserved. Under an actual burdens approach an identical tax could be valid in one state and invalid in another,

depending upon the taxing statutes of surrounding states, and those taxing statutes are constantly changing. The infinite variations available in such fact situations would make intelligent reliance on precedent impossible. Furthermore, if the courts should begin applying such an "actual burdens" test, the result would almost surely be a race in which each state legislature would gobble up all taxable transactions in sight for its own benefit at the expense of the surrounding states. *See Federal Limitations on State Taxation of Interstate Business, 75 Harvard Law Review 965 (1962).* There is also the likelihood that compensating taxes levied to take up any slack in the taxes laid by surrounding states would create a disguised multiple taxation. *See 75 Harvard Law Review 965 (1962).*

(4) Recent Decisions Confirm the "Risk" Test

The *General Motors* decision confirms that "multiple taxation" is still impermissible, citing *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).* In that case, this Court applied the *risk* test saying that the test is "the substantial effects, *actual or potential,* of the particular tax in suppressing unduly the commerce." (emphasis added). This Court said futher, through Justice Clark: "Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the *possibility of multiple taxation* resulting from other taxes of the same sort being imposed by other states." *347 U.S. 166* (emphasis added).

(5) The Tax is Laid on Mixed Commerce Without Apportionment, and is Measured by Gross Receipts

The Tax is laid, without any apportionment to reflect activities within the taxing state, on gross receipts from the delivery of electricity, part of which originates outside the taxing state. Because there is no apportionment

to local activities part of the tax falls directly upon the activity of engaging in interstate commerce; or, stated another way, it is levied upon an activity which is not a "local incident" separable from interstate commerce. [See Authorities collected in Appendix D at (1) and (5)].

In the past, this Court has wisely indulged a strong presumption against gross receipts taxes on the theory that they are more likely to result in unfair multiple taxation of interstate business. *See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)*, and *U.S. Glue Co. v. Oak Creek, 247 U.S. 321 at 329 (1918)*. The *Northwestern* decision carefully distinguished the tax before the Court from "an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share", *358 U.S. 462*, and the *Oak Creek* opinion details the evils of a gross receipts tax as compared with a net income tax. *247 U.S. 329*. See *Fisher's Blend Station, Inc. v. Tax Comm'n, 297 U.S. 650 (1936)* and *J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938)*.

Numerous decisions of this Court firmly establish that a gross receipts tax levied on mixed (interstate and intrastate) commerce is invalid unless apportioned to those activities attributable to the taxing state. They follow the well founded presumption against gross receipts taxes as especially likely to create multiple tax burdens. *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), (dictum)*, citing with approval *U. S. Glue Co. v. Oak Creek, 247 U.S. 321, 329 (1918); Railway Express Agency, Inc. v. Virgina, 347 U.S. 359, 367 (1954); Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948); Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422 (1947); Freeman v. Hewit, 329 U.S. 249 (1946)* ("direct unapportioned tax on gross receipts . . . has been definitely held beyond the state taxing power"). See also, *Hartman,*

State Taxation of Interstate Commerce: A Survey and an Appraisal 46 Va. L. Rev. 1051, 1105 (October, 1960); and numerous older cases collected in Appendix E.

(6) There is No "Local Incident" Sufficient To Support the Tax: It is Levied Directly on Interstate Commerce

The decision below necessarily rests on the proposition that the generation of electricity in one state, and its consumption in another, occurring, for any practical purpose simultaneously, are separate and distinguishable activities, "substantial economic factors" realistically separable from the interstate transmission, which are sufficient to support a local tax in each state. In *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954)* this Court said that a local incident sufficient to support a state tax must be a "substantial economic factor", and:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [Citing Authority] And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce."

Futhermore, this court has held with relation to physical objects that "local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." *Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, (1954).* See

also *Joseph v. Carter and Weekes Stevedoring Co., 330 U. S. 422 (1947)* and *Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951).*

The incident taxed is, in fact, the service of supplying electrical energy interstate, and the economic effect of such a tax is not only conducive to extra taxation on interstate business which local commerce does not share, but has, in the past, actually created such an additional burden upon Appellant solely because it transacted its business across state lines.

(7) THE COURT BELOW CONFUSES DUE PROCESS AND COMMERCE CLAUSE TESTS

Again, apparently relying on this Court's decision in *General Motors Corp.v. Washington, 377 U.S. 437 (1964),* the Court below has applied the test whether "the state has given anything for which it can ask return", a due process clause test, in a case where only Commerce Clause questions are raised. (See Appendix A, page 5). The Court of Civil Appeals' confusion of the two tests suggests that others may so misinterpret the *General Motors* opinion, and that it could be clarified on this point also.

(8) The Tax Discriminates Against Interstate Commerce And Is Laid on the Privilege of Engaging In It.

Because of the risk of multiple burdens created by the tax, its measurement by gross receipts unapportioned to reflect activity within the taxing state, and its impact on an interstate transaction which cannot realistically be carved into "local incidents" sufficient to support the tax; it discriminates against interstate commerce and is laid on the privilege of engaging in it. [That the imposition of multiple burdens creates discrimination is established in *Spector Motors Service v. O'Connor, 340 U.S. 602, 609 (1951)*].

F. CONCLUSION

The decision below is clearly erroneous and is likely to create great difficulty in recognizing permissible state taxation under the Commerce Clause.

1. It holds that *actual* multiple tax burdens must be shown in order to invalidate a state tax.

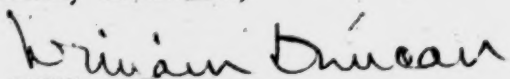
2. It holds that electricity may be taxed by gross receipts at the point of its consumption; that the tax need not be apportioned to reflect the taxpayer's activities within the taxing state. Taken in connection with *Utah Power and Light Co. v. Pfost, 286 U.S. 165 (1932)*, this means that an unapportioned gross receipts tax (or its equivalent) may be laid on both the generation and consumption of electricity occurring in different states, though the entire transaction involves exactly the same electrical energy and though it occurs in a split second. Again, taken with the *Pfost* case, the decision below means that the almost simultaneous interstate generation-transmission-consumption of electricity represents *three* distinct and realistically separable transactions which are "substantial economic factors" gross receipts taxes on two of which are not likely to create multiple tax burdens on the interstate business, that the "transmission" can be realistically separated from the generation at one end and the consumption at the other, and that *both* the near-instantaneous generation and consumption are valid local incidents which will support an unapportioned gross receipts tax in each state (even though the transmission itself is acknowledged to be an interstate transaction which is not taxable). So holding, it carries the *Pfost* analogy between electricity and physical goods to its ridiculous conclusion. It relies on *Pfost* decided in 1932, and *East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465*, decided in 1931, failing to consider that the important multiple burdens test was not adopted by the majority of this Court until 1938 in *Western Livestock v. Bureau of*

Revenue, 303 U.S. 250. [See *Hartman, State Taxation of Interstate Commerce: A Survey and an Appraisal, 46 Va. L. Rev. 1051 at 1074 (1960)*].

3. It confuses the Due Process Clause test of whether "the state has given anything for which it can ask return" which determines the state's right to levy *any* tax on this taxpayer (which right is undisputed here) with established Commerce Clause tests which determine the state's right to levy *this* tax. (See page 5 of Appendix A, and Appendix D).

4. Finally, its effect is to uphold a tax which unquestionably subjects this taxpayer to a greater burden than like businesses simply because it operates across state lines, erecting those domestic trade barriers which it is the purpose of the Commerce Clause to prohibit. It is therefore submitted that the decision of the Texas Court of Civil Appeals extends State taxing power beyond Constitutional limitations to the detriment of commerce between the states; that it employs clearly erroneous standards for testing the Constitutionality of such taxes; and that it is without valid precedent and completely novel, and will have far-reaching effects unless corrected. For these reasons the questions presented should be decided by this Court after oral argument and briefing on the merits.

Respectfully submitted,



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I, William Duncan, one of the attorneys for El Paso Electric Co., Appellant herein, and member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23 day of July, 1965, I served copies of the foregoing Jurisdictional Statement on the other parties hereto by mailing copies in a duly addressed envelope, air mail postage prepaid, to the attorney for all defendants, the Attorney General of the State of Texas, to the attention of Gordon Cass, Box R, Capitol Station, Austin, Texas

W Duncan

William Duncan

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APPENDIX A: OPINION BELOW

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 11,270

EL PASO ELECTRIC COMPANY, APPELLANT

vs.

ROBERT S. CALVERT ET AL, APPELLEES

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT,

NO. 134,237, HONORABLE JACK ROBERTS, JUDGE

Appellant, El Paso Electric Company, the plaintiff in the trial court, is a Texas Corporation engaged in the business of supplying electric energy to several incorporated municipalities in Texas. It paid the occupation tax required of public utilities by Article 11.03, Title 122A. Revised Civil Statutes of Texas, for the second, third and fourth quarters for the year 1963 and the first quarter of the year 1964 under protest and thereafter brought suit against the State of Texas to recover these taxes.

Trial was before the court and the court entered judgment for the State of Texas.

We affirm the judgment of the trial court.

Appellant is a privately owned public utility serving several Texas cities with electric power which includes the incorporated cities of El Paso, Anthony and Van Horn, Texas. In addition it serves some outlying areas in Texas and New Mexico. Appellant has two generating plants. One is located near Anapra, New Mexico, known as the Rio Grande Station, and the other, located near Newman, Texas, is known as the Newman Station. Apppellant also owns and operates a system of transmission lines, transformer stations and other equipment used in distributing electric energy for sale at retail and wholesale rates. Some of the equipment is located within the city limits of El Paso, Anthony and Van Horn, Texas.

Part of the power sold by appellant in Texas is generated in New Mexico at the Rio Grande Station; the remainder is generated in Texas at the Newman Station.

Article 11.03, V.C.S., provides for an occupation tax on utility companies selling electric power to incorporated cities or towns in the State of Texas, the pertinent portions of which are set out below.[1]

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[1] [Footnote 1 — portions of the contested statute — is omitted. See Appendix B].

Appellant is before this Court on two points of error: one, that the district court erred in concluding that the contested tax, under these facts, did not violate the Federal Constitution; and two, that the court erred in concluding that the tax did not violate the Texas Constitution.

With respect to the Federal Constitution, appellant argues that the tax in question is a tax in interstate commerce and creates the risk of a multiple tax burden on an interstate business.

Under the facts before us we find that over fifty per cent of the electric energy sold in Texas is generated in Texas while energy generated in Texas is transmitted into New Mexico and sold there. Conversely a portion of the energy generated in New Mexico crosses into Texas and is sold here while the remainder is sold in New Mexico. As we understand the facts there is a commingling of the electricity from its original sources of generation after which the larger portion is sold in Texas and the remainder in New Mexico.

We hold that under the statute in question the appellant is in the public utility business in El Paso, Anthony and Van Horn, Texas and that while a certain portion of the electricity used in that business passes from one State to another, the facts of the operation cause it to fall under that class of cases most recently exemplified by the United States Supreme Court in General Motors v. Washington, 84 S. Ct. 1564 (1964) wherein the Court stated:

> " 'It is beyond dispute,' we said in Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 (1959) at 458, 'that a State may not lay a tax on the "privilege" of engaging in interstate commerce.' But that is not this case. To so contend here

is to overlook a long line of cases of this Court holding that an in-state activity may be a sufficient local incident upon which a tax may be based. As we said in Spector Motor Service, Inc., v. O'Connor, 340 U.S. 602, 609 (1951), 'the State is not precluded from imposing taxes upon other activities or aspects of this (interstate) business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State.' This is exactly what Washington seeks to do here and we cannot say that appellant has shown that its activities within the State are not such incidents that the State can reach. North Co. v. Department of Revenue, supra at 537."

In East Ohio Gas Co. v. Tax Comm., 283 U.S. 465 (1931), the Supreme Court had before it a tax being imposed on corporations engaged in the business of supplying gas for light, heat or power in the State of Ohio at the rate of 1.35 per cent on all gross receipts on its intrastate business. The appellant in the Ohio case furnished some communities gas exclusively from outside the State of Ohio, to some, gas only from Ohio, and to others, a mixture of that from West Virginia and Ohio. The facts in that case are similar to those here. In Ohio the Court said:

"It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U.S. 330, 338. New Jersey Tel. Co. v. Tax Board, 280 U.S. 338, 346. And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business

done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. Sprout v. South Bend, 227 U.S. 163, 170, 171 and cases cited."

The tax in the case at bar meets the test laid down by the United States Supreme Court in that portion of the Ohio case quoted above. The interstate aspect of the business is separate and distinct from its intrastate business or business of a distinctly local nature.

The Court continues in Ohio:

> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

Also see McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, (1940).

Appellant contends that the New Mexico generated energy flows across the State line without interruption at the speed of light directly to the ultimate consumer. That its generation, transmission, delivery and consumption take place in the same microsecond and for all practical purposes are simultaneous. This may be true from a technical viewpoint; however, in Utah Power and Light v. Pfost, 286 U.S. 165 (1932), the Supreme Court held that while generation and transmission of electrical energy are substantially instantaneous they are essentially separable and distinct operations. Consequently, the sale of electricity

to users in the Texas towns is separable and distinct from the transmission thereof and is essentially local in character for tax purposes.

It would serve no useful purpose to discuss the many cases cited by appellant in its brief as they are, for the most part, cases dealing with the phohibition on the part of the states from imposing a tax on the privilege of engaging in interstate commerce. These cases are not in point here.

The Supreme Court of the United States has stated that in a situation such as the case before us the question is whether the State has given anything for which it can ask return. Texas has exercised its power of taxation in relation to the opportunities which it has given appellant such as the substantial privilege of carrying on business within its borders with the attendant protection and other benefits that it has conferred by the fact of being an orderly and civilized society. The fact that a tax is contingent upon events brought to pass without the State does not destroy the connection between such a tax and transactions within the State for which the tax is exacted. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940).

Nor do we feel that the "risk of multiple taxation" argument advanced by appellant is valid. While New Mexico did impose a tax on generation of electrical energy several years ago, such a tax was discontinued and at present there is no tax on generation. This point was raised in General Motors v. Washington, cited above, where General Motors claimed that a sales tax on their products in Washington was invalid, among other reasons, because some of its products taxed by Washington were manufactured in St. Louis where a license tax measured by sales before shipment is levied. In rejecting this argument the Court said:

> "Thereafter, in Northwestern States Portland Cement Co. v. Minnesota, supra, at 463, we held that

'in this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax, Cf. International Harvester Co. v. Evatt, 329 U.S. 416, 421-423 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation.' e. g. Northwestern States Portland Cement Co. v. Minnesota, supra, and we adhere to that position."

In the case at bar, the sales to local consumers in Texas are taxed by Texas, the energy is used and cannot be again taxed. The tax is levied on a segment of the appellant's several activities that is local to Texas and has no bearing on its interstate activity or activities attributable to New Meico. We overrule this point.

We likewise overrule appellant's contention that the contested tax violates Art. 8, Section 2, of the Texas Constitution, which provides that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

In Dallas Gas Company v. State, Tex. Civ. App., 261 S.W. 1063, writ refused, this Court in affirming a tax recovery by the State on occupation taxes imposed on those engaged in the wholesale oil business in Texas, stated that under the constitutional provision above quoted, the tax shall be equal and uniform upon the same class and that the law cannot operate unequally upon subjects between which there is no real difference to justify separate treatment.

Here the tax in question operates on all public utilities operating in the described towns or cities, is equal and uniform as to the general class covered and is not in violation of the constitutional provision quoted. As stated above, the appellant is being taxed on its local Texas operation as a public utility and as such is being treated equally with any other Texas public utility. It is for this reason that State v. Humble Pipe Line Co., 112 Tex. 375; 247 S.W. 1082 cited by appellants is not in point. In that case a gross receipt tax was levied on interstate pipe lines as well as intrastate pipelines. The Court held that since the tax on interstate pipelines was unconstitutional the remaining tax on intrastate pipelines would place an unequal burden on the same class of subjects consequently invidious to Art. 8, Sec. 2 of the Texas Constitution. The tax was not on any operation of the interstate pipeline that could be classed as local in nature but fell directly upon its interstate operation.

John C. Phillips, Associate Justice

Affirmed

Filed: December 2, 1964.

APPENDIX B: CONTESTED STATUTE

The full text of the contested statute follows:

"Art. 11.03 Gas, Electric Light, Power or Water Works

(1) Each individual, company, corporation, or association owning, operating, managing or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric

lights, electric power, or water, shall make quarterly, on the first day of January, April, July, and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer or superintendent of such company, or corporation, or association, showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water for the quarter next preceding. Said individual, company, corporation, or association, at the time of making said report for any such incorporated town or city of more than one thousand (1,000) inhabitants and less than two thousand, five hundred (2,500) inhabitants, according to the last Federal Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to .581% of said gross receipts, as shown by said report; and for any incorporated town or city of more than two thousand, five hundred (2,500) inhabitants and less than ten thousand (10,000) inhabitants, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association at the time of making said report shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.07% of said gross receipts, as shown by said report; and for any incorporated town or city of ten thousand (10,000) inhabitants or more, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.997% of said gross receipts, as shown by said report. Nothing herein shall apply to any such gas, electric light, power or water works, or water and light

plant, within this State, owned and operated by any city or town, nor to any county or water improvement or conservation district.

(2) Nothing herein shall be construed to require payment of the tax on gross receipts herein levied more than once on the same commodity, and where the commodity is produced by one individual, company, corporation, or association, and distributed by another, the tax shall be paid by the distributor alone.

(3) No city or other political subdivision of this State, by virtue of its taxing power, proprietary power, police power or otherwise shall impose an occupation tax or charge of any sort upon any person, corporation, or association required to pay an occupation tax under this Article. Nothing in this Article shall be constructed as affecting in anyway the collection of ad valorem taxes authorized by law; nor impairing or altering in any way the provisions of any contracts, agreements, or franchises now in existence, or hereafter made between a city and a public uility, relating to payments of any sort to a city. Nothing in this Article shall be construed as prohibiting an incorporated city or town from making a reasonable charge, otherwise lawful, for the use of its streets, alleys, and public ways by a public utility in the conduct of its business, and each such city shall have such right and power; but any such charges, whether designated as rentals or otherwise, and whether measured by gross receipts, units of installation, or in any manner, shall not in the aggregate exceed the equivalent of two per cent (2%) of the gross receipts of such utility within such municipality derived from the sale of gas, electric energy, or water. Any special taxes, rentals, contributions, or charges accruing after the effective date of this Act, under the terms of any pre-existing contract or franchise, against any utility paying an occupation tax under this

Article, when paid to any such city, shall be credited on the amount owed by such public utility on any charge or rental imposed for the use of streets, alleys, and public ways, levied by ordinance, and accruing after the effective date of this Act; provided that where valid ordinances have been enacted heretofore by cities imposing a charge or rental in excess of two per cent (2%) of the gross receipts of such utilities, nothing herein shall be construed so as to prohibit the collection of such sum as may be due said cities thereunder from the date of said ordinance up to the time this Article shall become effective.

(4) And provided further that utilities paying an occupation tax under this Article shall not hereafter be required to pay the license fee imposed in Article 5a, House Bill No. 18, Chapter 400, Acts of the Forty-fourth Legislature, for the privilege of selling gas and electric appliances and parts for the repairs thereof, in towns of three thousand (3,000) or less in population according to the next preceding Federal Census. Acts 1959, 56th Leg. 3rd C.S. p. 187, ch. 1."

APPENDIX C: NEW MEXICO STATUTE

The relevant parts of the New Mexico tax effective from 1942 to 1957 are:

"72-16-4. Privilege Taxes Levied—Measured By Amount of Business.—There is hereby levied, and shall be collected by the Bureau of Revenue, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the state of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: . . . "

"B. At an amount equal to one-fourth of one per cent of the gross receipts of the business of every person engaging or continuing in each or any or all of the businesses of manufacturing, smelting, refining, reducing, processing, compounding, fabricating, packing, preserving, distilling, preparing for sale or commercial use, or the making of wares, commodities or material products by hand or machinery, *including the generation of electricity;* provided that the tax provided by this paragraph shall be at the rate of one half of one percent of the gross receipts of the business of every person engaging or continuing in the business of smelting, leaching, refining, reducing, or processing oil, natural gas, carbon dioxide gas, potash, copper, gold, silver, limestone, sand, gravel or other metalliferous or nonmetalliferous products or combinations, or compound of mineral products.

The measure of the tax imposed by this paragraph is the value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside of the state." (emphasis added).

APPENDIX D: BASIC CASES

Article 1 Section 8 of the United States Constitution, includes the "Commerce Clause", which gives to Congress the power to regulate commerce among the several states. It was enacted to secure freedom of trade between the various states and to protect interstate commerce from discrimination by state action. See, e. g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 at 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 at 170 (1954); McLeod v. Dilworth, 322 U.S. 327, 330, 331 (1944).*

The U.S. Supreme Court has held that the Commerce Clause grants exclusive power to the Congress to regulate interstate commerce. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, supra at 458; Gibbons v. Ogden, 9 Wheat 1; 6 L.Ed. 23 (1824);* and that despite Congressional failure to act on the subject in the area of taxation, interstate commerce must be free from any direct restrictions imposed by the states. *Northwestern States Portland Cement Co., supra at 458.*

(1) Except for a net income tax, where the taxed income from a foreign corporation is apportioned fairly to the activities of that corporation within the taxing state, no tax directly upon interstate commerce itself is permissible. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* (a levy must not be discriminatory and must be properly apportioned to local activities within the taxing state forming sufficient "nexus" to support the same); *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 393 (1951); Spector Motor Service v. O'Connor, 340 U.S. 602, 610 (1951); Memphis Natural Gas Company v. Stone, 335 U.S. 80, 88 and 89 (1948); Nippert v. Richmond, 327 U.S. 416, 423 (1946); Freeman v. Hewit, 329 U.S. 249, 256 (1946)* (state not allowed "one single tax worth of direct interference with the free flow of commerce"); *J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311 (1938); Fisher's Blend Station, Inc. v. Tax Comm'n, 297 U.S. 650 (1936).* See in accord, *46 Va. L. Rev. 1087, n.133 (1960).* From this rule there has evolved a related second test, requiring validly separable "local incidents"—realistically severable local activities—to be isolated from the stream of commerce in order to support

a state levy. This requirement, now treated as a separate test, is set out in (5) following.

(2) No tax is valid if it creates the risk of a "multiple burden" upon interstate commerce to which intrastate commerce is not subject. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 367 (1954); Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Nippert v. Richmond, 327 U.S. 416, 428 n.19 (1946); Freeman v. Hewit, 329 U. S. 249, 254 (1946); McLeod v. Dilworth, 322 U.S. 327 (1944); McGoldrick v. Berwind-White Coal Mining Co. 309 U.S. 33 (1940); Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); J.D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311 (1938); Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938); See 46 Va. L. Rev. 1074-82 (1960).*

(3) No tax is valid if it is one upon the "privilege" of engaging in interstate commerce. See e.g. *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951); Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (1951); Nippert v. Richmond, 327 U.S. 416, 428 (1946); Freeman v. Hewit, 329 U.S. 249 (1946)* (a direct unapportioned gross receipts tax "has been definitely held beyond the state taxing power"); *Gwin, White & Prince v. Henneford, 305 U.S. 434, 441 (1939). See 46 Va. L. Rev. 1051 (1960).* And it has been declared that if the tax is

upon the "privilege", then it is invalid no matter how fairly it is apportioned to intrastate business. *Spector Motor Service v. O'Connor, 340 U.S. 602 at 609 (1951)* (indicating that a tax becomes discriminatory by imposing "undue burdens" on interstate commerce).

(4) No tax is valid which discriminates against interstate commerce. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 393 (1951); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948); Nippert v. Richmond, 327 U.S. 416, 428 (1946).*

(5) No tax is valid if it is upon an "incident" which is not some realistically separable local activity which can form the nexus of a state levy. *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 393 (1951); Spector Motor Service v. O'Connor, 340 U.S. 602, 610 (1951); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948); Nippert v. Richmond, 327 U.S. 416, 423 (1946); Freeman v. Hewit, 329 U.S. 249, 253 (1946).* It must be a validly separable local activity, and not a fictitious label given to an integral part of the interstate commerce; See *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 (1954); Spector Motor Service v. O'Connor, 340 U.S. 602 (1951); Nippert v. Richmond, 327 U.S. 416 (1946);* it must be a "substantial economic factor"; *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 169 (1954);* and it must be one which does not lend itself to repeated exactions in other states. *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 169 (1954). Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948)* states: "But the choice of local incident for the

tax, without more, is not enough. There are always convenient local incidents in every interstate operation. [Citing *Nippert v. Richmond*] The incident selected should be one that does not lend itself to repeated exactions in other states." See *Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 429 (1947); Nippert v. Richmond, 327 U. S. 416 (1946)*, and *Freeman v. Hewit, 329 U.S. 249 (1946)*, to the same effect.

(6) No tax is valid if it is a direct imposition or restriction on intersate commece or it is an interference with the free flow of commerce. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 at 458 (1959)* and *Gibbons v. Ogden, 9 Wheat 6, L.Ed. 23 (1824)*.

In addition to those tests the Court has used other criteria for state tax validity. Because of the likelihood that gross receipts taxes will fail to meet one or more of the above tests, the Court has indulged a strong presumption against them generally, whether apportioned or not, and against unapportioned taxes, whether upon gross receipts or not. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, supra* and *Freeman v. Hewit, 329 U.S. 249 at 256 (1946), discussion at (5) above, and Appendix E.*

APPENDIX E:*

UNAPPORTIONED GROSS RECEIPTS TAXES HELD INVALID (ADDITIONAL AUTHORITY)

Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939); J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938), Puget Sound Stevedoring Co. v.

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*Continued from authorities cited in discussion at E (5) of text above.

State Tax Comm'n., 302 U.S. 90 (1937); Fisher's Blend Station, Inc. v. State Tax Comm'n., 297 U.S. 650 (1936); Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917); Meyer v. Wells Fargo Co., 223 U.S. 298, 300 (1912) (Tax invalid event though an attempt was made to apportion it to "per cent of gross receipts as its business done within the state bears to the whole of its business", opinion by Holmes, J.); *Kansas City F.S. & M. Ry. Co. v. Botkin, 240 U.S. 227 (1916) (dictum); Galveston H. & S. A. R. Co. v. Texas, 210 U.S. 217 (1908); Western Union Tel. Co. v. Alabama Board of Assessment, 132 U.S. 472 (1889); Ratterman v. Western Union Tel. Co., 127 U. S. 411 (1888); Leloup v. Mobile, 127 U.S. 640 (1888); Fargo v. Michigan, 121 U.S. 230 (1887); Philadelphia & S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887).*

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No. 395

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

EL PASO ELECTRIC COMPANY, *Appellant,*

v.

ROBERT S. CALVERT, et al., *Appellees.*

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees, pursuant to Rule 16 (1) (a) of the Revised Rules of the Supreme Court of the United States, move to dismiss on the ground that the question presented is so unsubstantial as not to need further argument.

A. QUESTION PRESENTED

Whether an occupation tax levied by the State of Texas on a privately owned public utility serving incorporated cities in Texas with electric power violates the Commerce Clause of the United States Constitution, when the source of such power is from a generating plant located within the State of Texas and one within the State of New Mexico.

B. STATUTE INVOLVED

Article 11.03, Title 122A, Taxation-General, Revised Civil Statutes of Texas, is the statute involved in this appeal. The statute is printed in Appendix A, *infra*, pp. 14-16.

C. STATEMENT

This litigation concerns the business activities of a privately owned public utility operating in Texas and the applicability of certain state occupation taxes thereto. Appellant serves several Texas cities, including the incorporated cities of El Paso, Anthony, and Van Horn, Texas, with electric power. In addition, it serves some outlying areas in Texas and New Mexico.

The Company has two generating plants: one located near Anapra, New Mexico, known as the "Rio Grande Station," and the other located near Newman, Texas, in the State of Texas, known as the "Newman Station." The company also owns and operates a system of transmission lines, transformer stations, and other equipment used in distributing electric energy for sale at retail and wholesale rates, some of which equipment is located within the city limits of El Paso, Anthony, and Van Horn, Texas.

Part of the power sold by Appellant in Texas is generated in New Mexico at the Rio Grande Station, the

remainder is generated in Texas at the Newman Station.

During a portion of the period for which the tax was paid under protest, said protest period being from April 1, 1963, to April 1, 1964, the electric energy produced in Texas and New Mexico varied from month to month, as well as the electric energy purchased by Appellant for resale also varied. Some of Appellant's customers come within the provisions of Article 11.03, *supra,* which requires that Appellant pay an occupation tax based on the gross receipts received from such business done in certain sized cities or towns. The tax is graduated, depending upon the population of said city or town. The tax reaches only the sales of electricity in incorporated cities in the State of Texas. Receipts from sales which are made in other states are not taxed. Neither are receipts from sales in non-incorporated areas of the State of Texas taxed.

D. ARGUMENT

The issue in this case is clear. It is whether the Appellant is liable for the state occupation tax levied on the operation of a public utility company in cities covered by the applicable statute within the State of Texas. The changing of the name of the tax by the Appellant, the inclusion of an old repealed New Mexico tax in the "Question Presented" cannot convert the issue into one warranting review by this Court on Appeal.

The matter subject to taxation is one strictly between the State of Texas and one of its taxpayers, covering the operation of a particular business within the State. No Federal Question is involved, and the mere fact that a portion of the electric power sold by Appellant within the State of Texas has its source in New Mexico

does not present a substantial Federal Question for review. The facts clearly show that the source of such portion is merely incidental to the operation of the utility companies within the State of Texas.

The State of Texas, in its sovereign power, can impose a tax upon the act of carrying on a particular business (such as Appellant is engaged in) within the confines of its own state. *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 (1939); *Ficklen v. Shelby County Taxing District,* 145 U.S. 1; *American Mfg. Co. v. St. Louis,* 250 U.S. 459; *United North & South Development Co. v. Heath,* 78 S.W. 2d 650; *International Harvester Co. v. Evatt Tax. Comm.,* 329 U.S. 416 (1947).

In *Missouri v. Kansas Gas Co.,* 265 U.S. 298 (1924), it was held:

> "In the absence of congressional legislation, a State may constitutionally *impose taxes,* enact inspection laws . . . although they may have an incidental effect upon commerce." (Emphasis added.)

The public utility business operated by the Appellant in the cities of El Paso, Anthony, and Van Horn, Texas, constitute a sizeable Texas business operation, and are subject to the sovereign power of the State of Texas.

In the case of *East Ohio Gas Co. v. Tax Comm.,* 283 U.S. 465 (1931), this Court had before it a tax, being imposed on corporations engaged in the business of supplying gas for light, heat or power in the State of Ohio, at the rate of 1.35 per cent of all gross receipts on its intrastate business. The Appellant in the *Ohio* case furnished to some communities gas exclusively from outside the State of Ohio, to some gas only from Ohio, and to others a mixture of that from West Vir-

ginia and Ohio. The facts in the cited case are precisely the same as those that exist in the instant case.

This Court said in the *Ohio* case:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U.S. 330, 338. New Jersey Tel. Co. v. Tax Board, 280 U.S. 338, 346. And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. Sprout v. South Bend, 277 U.S. 163, 170-171 and cases cited."

The last paragraph of the *Ohio* case clearly covers the instant case in every respect when it says:

> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

In the instant case, Appellant enjoys and exercises the privilege of operating public utility companies in three (3) Texas cities. If, for any reason, it discontinued its operation in these cities, nothing would prevent it from continuing to transmit electric energy from New Mexico into Texas, across a part of Texas, and then from Texas back into New Mexico. It could be accomplished by merely pulling a switch at the transformer stations that connect the transmission

lines with the local stations, and thereafter Appellant would not be subject to the tax imposed by Article 11.03, *supra.*

The facts in the *Ohio* case, above discussed, and those in the instant case being so precisely in point, and the tax imposed meeting the tests laid down by this Court, clearly demonstrate that the judgment below is correct.

The operation of a local business within a state and its relation on interstate commerce has been passed on by this Court on several different occasions.

In *Missouri v. Kansas Gas Co.,* 265 U.S. 298 (1924), it was held:

> "The business of supplying, on demand, local consumers, *is local,* even though the gas be brought from another state and drawn directly from its interstate mains; and this is so whether the local distribution be *made by the transporting company or by independent distribution companies.* In each case the *local interest is paramount,* and the interference with interstate commerce, if any, *indirect and of minor importance.*" (Emphasis added.)

In *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649 (1942), the company piped gas into the State and sold it to a distribution company with whom it had a partnership agreement concerning profits from the sale to the consumer. This Court held:

> "This Court has often had occasion to rule that the retail sale of gas at the burner tip by one who pipes the gas into the State, or by a local distribution company acquiring the gas from another similarly brought it into the State, is subject to state taxation and regulation."

In 1940 this Court decided the very important *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, which dealt with a gross receipts tax upon the sale

of tangible personal property other than gas or electricity. The property had been shipped into the taxing State by the seller and distributed directly to local purchasers. This Court, following many of the cases already cited, found that the sale to the ultimate consumer was a local business and was subject to the gross receipts tax even though the sale was in interstate commerce. Neither the fact that Berwind-White transported the goods in interstate commerce, nor the fact that sales may have been made in states other than the taxing state kept the seller's activities from being local rather than national in nature.

This Court said:

> "Nor is taxation of a local business or occupation which is separate and distinct from the transaction or intercourse which is interstate commerce, forbidden. . . ."

As is being pointed out, Appellant's business of local sale and distribution is separate and distinct from its business of transmitting electricity between the various states, which latter business only is national in character and beyond the reach of State taxation.

The Courts find no distinction between the local activity in *Berwind-White* and the local activity of distributing electricity. Both activities are essentially local and not national in character for tax purposes and the Courts have drawn analogies between the two types of distribution. *Utah Power and Light v. Pfost,* 286 U.S. 165 (1932); *International Harvester Co. v. Indiana,* 322 U.S. 340 (1944); and *Broad River Power Co. v. Query,* 60 F. 2d 544 (1942).

It is clear that the State of Texas has acted within its constitutional power to tax the business of a public utility company operating in the State of Texas, even

though some of its electric energy crosses the State line. This Court aptly stated the underlying principle in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445 (1940) when it said:

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society.
>
> ". . . The simple but controlling question is whether the State has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

Petitioner herein enjoys the privilege of carrying on a public utility business in one of our State's larger cites, as well as in the surrounding area. From the record it appears that the business is a very profitable one. It has received and is enjoying the benefits from such business.

The full protection of the State of Texas and all its power is available to Appellant. Appellant's opportunities in this business are unhampered by the State of Texas.

The occupation tax levied by the State of Texas is measured by the gross receipts *from the sale of electricity within an incorporated city or town in the State*

of Texas without regard to the next preceding source of such commodity. There is no attempt to increase the tax liability of any company because of its activities in interstate commerce and the cost of the company's interstate commerce is not increased by the tax levied to any greater extent than is the cost of a purely intrastate business.

In upholding the gross receipts tax upon the sale of goods which the seller shipped into the taxing state in interstate commerce, in *McGoldrick v. Berwind-White Coal Mining Co., supra,* pages 57 and 58, this Court went on to say:

> "Finally, it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state.
>
> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity, which, apart from its effect on the commerce, is subject to the state taxing power."

Of course, the gross receipts tax in the *Berwind-White* case was of the same nature and character as the tax here involved. It was so held in *International Harvester Co. v. Indiana,* 322 U.S. 340 (1944).

> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than their descriptive labels we must acknowledge that the sales tax sustained in the Berwind-White case was, in form, *imposed upon the gross receipts from an interstate commerce sale."* (Emphasis added.)

The facts in the *Berwind-White* case are *exactly parallel* with the facts in this case. Berwind-White brought its product into the taxing state from another state for

sale and distribution. The goods were acknowledged to be in interstate commerce. But this Court held that the sale was local in character and subject to a state gross receipts tax on sales. Appellant attempts to overcome the result of the *Berwind-White* case by alluding to the unique characteristics of electricity, its generation, transmission and consumption saying that the state can find no local activity. But this argument has long since been refuted in the famous case of *Utah Power and Light Co. v. Pfost,* 286 U.S. 165 (1932).

Appellant stresses the fact that a great risk is present and in fact it has already experienced double taxation from the operation of its business, and includes in the stipulations and argues the point, all of which is immaterial and irrelevant to this suit, about the New Mexico tax levied on the generation of electric energy in New Mexico. It is to be noted that the New Mexico statute is not now in effect, and in fact Appellant is not paying any generating tax in New Mexico, nor to the State of Texas on current moving out of Texas into New Mexico, only paying on the electric energy sold in the operation of the public utility companies in the three incorporated cities in Texas.

The electric energy so sold in the above mentioned cities and towns is gone, it has been used up, it will not be nor can it ever be taxed again, therefore, no risk exists for multiple taxation. If New Mexico were to impose any type of tax on the operation of Appellant in that state it will be on something other than the product upon which the tax in question is levied. The cases heretofore cited and discussed in this brief uphold the taxing of both generating and the sale of electricity.

The tax levied is on the sale of the electric energy to customers primarily in the three incorporated cities or

towns in Texas, heretofore mentioned. It has been completed in Texas, and as stated above there is no risk, no danger of multiple taxation present.

This Court met the attack on multiple taxation in the case of *General Motors v. Washington, et al.*, dated June 8, 1964, 84 S. Ct. 1564 (1964), when it said:

> "A more difficult question might arise from Appellant's claim of multiple taxation. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 440 (1939). General Motors claims that some of its products taxed by Washington are manufactured in St. Louis where a license tax, measured by sales before shipment, is levied. See American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). It is also urged that General Motors' Oregon based activity which concerns Washington sales might afford sufficient incidents for a similar tax by Oregon. The Court touched upon the problem of multiple taxation in Northwest Airlines v. Minnesota, supra, at 295, but laid it to one side as 'not now before us.' Thereafter, in Northwestern States Portland Cement Co. v. Minnesota, supra, at 463, we held that in this type of case, the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. Cf. International Harvester Co. v. Evatt, 329 U.S. 416, 421-423 (1947). And further, it has not been shown that Oregon levies any tax on Appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation.' e.g. Northwestern States Portland Cement Co. v. Minnesota, supra, and we adhere to that position."

Appellant has not met any of the tests laid out in the *Washington* case. The mere fact that at one time

New Mexico levied a generating tax on electricity produced in that State, and Appellant paid taxes thereon and then paid the tax in question, all of which this Court has said was proper, forms no basis for multiple taxation at this time, nor can Appellant strike down a tax on mere speculation as to what might happen in the future.

E. CONCLUSION

We respectfully submit, therefore, that the Appellant presents no substantial question for the decision of this Court and that the appeal be dismissed.

Respectfully submitted.

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Attorney General of Texas

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Assistant

By H. Grady Chandler
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CERTIFICATE OF SERVICE

I, H. Grady Chandler, one of the attorneys for Robert S. Calvert, et al., Appellees herein, and member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of August, 1965, I served copies of the foregoing Motion to Dismiss on the other parties hereto by mailing copies in a duly addressed envelope, air mail postage prepaid, to the attorney for Appellant, William Duncan, Attorney at Law, 1500 First National Building, El Paso, Texas.

H. Grady Chandler

H. GRADY CHANDLER

APPENDIX A

Text of statutes involved.

"Art. 11.03, Gas, Electric Light, Power or Water Works

(1) Each individual company, corporation, or association owning, operating, managing or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric lights, electric power, or water, shall make quarterly, on the first day of January, April, July, and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer or superintendent of such company, or corporation, or association, showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water for the quarter next preceding. Said individual, company, corporation, or association, at the time of making said report for any such incorporated town or city of more than one thousand (1,000) inhabitants and less than two thousand, five hundred (2,500) inhabitants, according to the last Federal Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to .581% of said gross receipts, as shown by said report; and for any incorporated town or city of more than two thousand, five hundred (2,500) inhabitants and less than ten thousand (10,000) inhabitants, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association at the time of making said report shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.07% of said gross receipts, as shown by said report; and for

any incorporated town or city of ten thousand (10,000) inhabitants or more, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.997% of said gross receipts, as shown by said report. Nothing herein shall apply to any such gas, electric light, power or water works, or water and light plant, within this State, owned and operated by any city or town, nor to any county or water improvement or conservation district.

(2) Nothing herein shall be construed to require payment of the tax on gross receipts herein levied more than once on the same commodity, and where the commodity is produced by one individual, company, corporation, or association, and distributed by another, the tax shall be paid by the distributor alone.

(3) No city or other political subdivision of this State, by virtue of its taxing power, proprietary power, police power or otherwise, shall impose an occupation tax or charge of any sort upon any person, corporation, or association required to pay an occupation tax under this Article. Nothing in this Article shall be construed as affecting in any way the collection of ad valorem taxes authorized by law; nor impairing or altering in any way the provisions of any contracts, agreements, or franchises now in existence, or hereafter made between a city and a public utility, relating to payments of any sort to a city. Nothing in this Article shall be construed as prohibiting an incorporated city or town from making a reasonable charge, otherwise lawful, for the use of its streets, alleys, and public ways by a public utility in the conduct of its business, and each such city shall have such right and power; but any such charges, whether designated as rentals or otherwise, and whether measured by gross receipts, units of installation, or in any manner, shall not in the aggregate exceed the equivalent of two per cent (2%) of the gross receipts of such utility within such municipality

derived from the sale of gas, electric energy, or water. Any special taxes, rentals, contributions, or charges accruing after the effective date of this Act, under the terms of any pre-existing contract or franchise, against any utility paying an occupation tax under this Article, when paid to any such city, shall be credited on the amount owed by such public utility on any charge or rental imposed for the use of streets, alleys, and public ways, levied by ordinance, and accruing after the effective date of this Act; provided that where valid ordinances have been enacted heretofore by cities imposing a charge or rental in excess of two per cent (2%) of the gross receipts of such utilities, nothing herein shall be construed so as to prohibit the collection of such sum as may be due said cities thereunder from the date of said ordinances up to the time this Article shall become effective.

(4) And provided further that utilities paying an occupation tax under this Article shall not hereafter be required to pay the license fee imposed in Article 5a, House Bill No. 18, Chapter 400, Acts of the Forty-fourth Legislature, for the privilege of selling gas and electric appliances and parts for the repairs thereof, in towns of three thousand (3,000) or less in population according to the next preceding Federal Census. Acts 1959, 56th Leg. 3rd C. S. p. 187, ch. 1."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 395

EL PASO ELECTRIC COMPANY, Appellant

v.

ROBERT S. CALVERT, et al., Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

REPLY TO MOTION TO DISMISS

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REPLY TO MOTION TO DISMISS

Appellant, pursuant to Rule 40 (4), submits this Reply Brief in answer to Appellees' Motion to Dismiss. Page references are to State's Motion to Dismiss.

ARGUMENT

1. East Ohio Gas Co. v. Tax Comm'n, 283 U.S: 465 (1931)

At page six the State relies on the *East Ohio Gas* case. It is not in point because (1) it involves gas and not electricity and (2) the taxpayer there is an intervening intrastate distributor who takes the gas from interstate suppliers

and whose business activities are totally confined to the taxing state. It is not authoritative because:

(1) The entire essential part of the holding—that the gas has ceased to move in interstate commerce when the tax attaches—is grounded in the analogy between the reduction of gas pressure and the breaking of an original package after shipment in interstate commerce. The "original package doctrine"—always strained when applied to gas and electricity—has been clearly rejected with respect to them. *Panhandle Eastern Pipe Line Co. v Public Service Comm'n, 332 U.S. 507 (1947); Wisconsin-Michigan Power Co. v. FPC, 197 F.2d 472 (7th Cir. 1952), cert. den'd, 345 U.S. 934 (1953).* The State admits this in its Trial Court brief. *Broad River Power Co. v. Query, 52 F.2d 515 (E.D.S.Car., 1931), 60 F.2d 528 (E.D.S.Car., 1932),* an old district court case cited by the State at page seven, is founded upon the same outdated analogy. In addition, the *Broad River* case makes some highly questionable distinctions between power which has passed through transformers (intrastate commerce) and that which has not (interstate commmerce.) 52 F.2d 524.

(2) The test of whether the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business is outdated. [See *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* outlining "firm peaks of decision" in Commerce Clause tax cases, and Appendix D to Jurisdictional Statement.] Even if the test applies, there is no showing that this tax meets it.

(3) East Ohio was decided before the Court adopted the important multiple burdens test in 1938. See *Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938).* No multiple burdens question was raised in the *East Ohio* case.

2. Missouri v. Kansas Gas Co., 265 U.S. 298 (1924)

At page six, the State relies on *Missouri v. Kansas Gas Co.* That case determines validity of State *regulation* under the Commerce Clause. State regulation cases are not applicable to tax cases under the Commerce Clause. [See *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* and recent authorities cited in Jurisdictional statement.] One old case, the *East Ohio Gas Co.* case relied on by the State above, [*283 U.S. 465, 472 (1931)*], has confused state power to regulate with state power to tax. The leading decisions make it clear, however, that regulation and tax cases are not interchangeable. [*See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* and Appendix D of *Jurisdictional Statement*]. Notably absent from the State's Motion is *FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965)*. If gas regulation cases are applicable to tax cases, then it is clear that, under the *Amerada* decision, *all* of the "sales" of power in Texas are exempt since intrastate and interstate electricity are commingled on the supplying lines. [TR. 37]. Appellant has urged under applicable *tax* cases that only the Texas "sales" of power generated in New Mexico are exempt from State taxation. If *Amerada* applies, then *all* sales of power by this Appellant should be exempt. No regulation case, however, governs validity of state taxation.

3. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942)

The *Beeler* case (page six) is inapplicable here because:

It is (1) a *net income* tax apportioned to business done within the taxing state, *not measured by gross receipts* and (2) laid on sales of *gas*. There is absolutely no question

about the validity of a properly apportioned net income tax. The tax in question is not that type and *Beeler* is inapplicable.

4. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) and *International Harvester Co. v. Indiana, 322 U.S. 340 (1944)*

At pages six and seven the State relies on the *McGoldrick* and *International Harvester* cases. They determine the validity of a sales tax laid on the sale of physical goods to which possession passes within the taxing state. Electricity is simply not analogous to physical goods. When it is "sold" no title changes hands, no physical property is delivered, and the entire transaction, occurring across state lines, is concluded in a fraction of a second. [See discussion of *Pfost* case analogy to physical goods at page 14 of Jurisdictional Statement]. If there is any analogy between electricity and tangible goods, it is between the delivery of the electricity in question and the delivery of physical goods which have been transported in interstate commerce. Clearly, such deliveries are not taxable by the States. *Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422 (1947)* and *Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951).*

5. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940)

At page eight, the State relies on the *Penney* case.

(1) That is a due process case applying due process tests under the 14th amendment. No due process question is raised here.

(2) It involves a net income (dividends) tax. It is irrelevant for the same reasons that *Beeler,* above, is irrelevant.

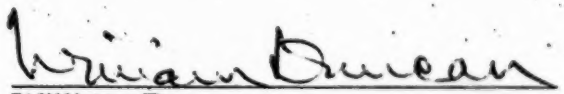
6. The State's Multiple Burdens Argument.

At page ten, the State argues that the gas is finally consumed in Texas and cannot thereafter be subjected to the risk of another tax. That argument, of course, ignores the obvious question: Is there a risk of multiple tax burdens *before* the final consumption of the electricity in Texas? Specifically, might New Mexico tax the generation and Texas the "sale" of identical power?

CONCLUSION

The inability of the parties to give meaningful treatment to this problem in the short Jurisdictional Statement and Motion to Dismiss demonstrates the complexity of it and the need for full briefs and oral argument on the merits.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I, William Duncan, one of the attorneys for El Paso Electric Co., Appellant herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of August, 1965, I served copies of the foregoing Reply to Motion to Dismiss on the other parties hereto by mailing copies in a duly addressed envelope, air mail postage prepaid, to the attorney for all defendants, the Attorney General of the State of Texas, to the attention of Gordon Cass, Box R, Capitol Station, Austin, Texas.

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END